

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GREGORY A. MYERS,

Plaintiff,

v.

FLAGSTAR BANK, FSB, et al.,

Defendants.

CASE NO. C15-5067 RBL

ORDER ON VARIOUS MOTIONS

[Dkt. #s 14, 15, 18, and 24]

THIS MATTER is before the Court on the following motions: Defendant FNMA's and Defendant Flagstar's Motion to Dismiss [Dkt. #14]; Defendant MTC's Motion to Dismiss [Dkt. #15]; Plaintiff Myers's Emergency Motion for Court to Order Flagstar to Cease Ongoing Mortgage Payment Demands and Request to File a First Amended Complaint [Dkt. #18]; and Myers's Motion to Stop Mortgage Payment Demands for Discharged Debt [Dkt. #24].

This is the second time Myers has sued Flagstar and MTC for claims arising out of his mortgage, its default, and the subsequent foreclosure. *See Myers v MERS*, Cause No. 11-cv-5582RBL. This Court dismissed the prior action with prejudice, Myers appealed, and the Ninth Circuit affirmed [*See* Dkt. #s 28 and 29 in that case]. During the same period, Myers filed for bankruptcy protection, and ultimately obtained a discharge of his unsecured debt. Defendants

1 argue that Myers's current claims are barred by *res judicata*. And, they argue, even if the claims  
2 are not barred, Myers has waived the bulk of them by failing to restrain the foreclosure sale.  
3 Defendants also claim that Myers is judicially estopped from asserting his claims because he did  
4 not list them as assets in his bankruptcy, and that the claims fail on the merits as a matter of law,  
5 in any event. They seek dismissal under Fed. R. Civ. P. 12 (b)(6).

6 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
7 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
8 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
9 facts to state a claim for relief that is plausible on its face. *See Aschcroft v. Iqbal*, 129 S. Ct.  
10 1937, 1949 (2009). A claim has "facial plausibility" when the party seeking relief "pleads  
11 factual content that allows the court to draw the reasonable inference that the defendant is liable  
12 for the misconduct alleged." *Id.* Although the Court must accept as true the Complaint's well-  
13 pled facts, conclusory allegations of law and unwarranted inferences will not defeat a Rule 12(c)  
14 motion. *Vazquez v. L. A. County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State*  
15 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds'  
16 of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic  
17 recitation of the elements of a cause of action will not do. Factual allegations must be enough to  
18 raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
19 (2007) (citations and footnotes omitted). This requires a plaintiff to plead "more than an  
20 unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 129 S. Ct. at 1949 (citing  
21 *Twombly*).

22 On a Rule 12(b)(6) motion, "a district court should grant leave to amend even if no  
23 request to amend the pleading was made, unless it determines that the pleading could not  
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1 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection*  
2 *Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). However, where the facts are not in dispute, and the  
3 sole issue is whether there is liability as a matter of substantive law, the court may deny leave to  
4 amend. *Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

5 The underlying impetus for Myers’s *pro se* complaint appears to be that, despite the  
6 foreclosure and the discharge, Flagstar continues to send him “mortgage statements” reflecting  
7 that he owes the remainder of his mortgage. Flagstar has not otherwise sought to collect any  
8 deficiency, and it seems to concede that Myers does not owe it:

9 Undersigned counsel has received confirmation from Flagstar that it will ensure  
10 any mail that might be otherwise directed to Plaintiff will not be delivered going  
11 forward. But regardless, even if mailings were improper, the Court should deny  
Plaintiff’s request for an injunction because the Bankruptcy Code preempts any  
state laws addressing Bankruptcy Court proceedings.

12 [Dkt. #27 at 2].

13 Nevertheless, Myers has sued for far more than making the mortgage statements stop. He  
14 claims that the foreclosure was wrongful and violated the Deed of Trust Act—the same claim  
15 that was asserted and dismissed with prejudice in the 2011 case. He claims he should have been  
16 permitted to modify his loan under the HAMP program—the same claim that was asserted and  
17 dismissed with prejudice in the 2011 case. And he claims that the Note and Deed of Trust were  
18 not valid or enforceable—the same claim that was asserted and dismissed with prejudice in the  
19 2011 case.

20 The doctrine of *res judicata* precludes re-litigation of claims that were raised in a prior  
21 action, or which *could have been* raised in a prior action. *W. Radio Servs. Co. v. Glickman*, 123  
22 F.3d 1189, 1192 (9th Cir. 1997) (emphasis added). An action is barred by *res judicata* when an  
23 earlier suit: (1) involved the same claim or cause of action as the later suit; (2) involved the  
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1 same parties; and (3) reached a final judgment on the merits. *Mpoyo v. Litton Electro-Optical*  
2 *Sys.*, 430 F.3d 985, 987 (9th Cir. 2005).

3 The defendants are correct. Myers's claims in this case were raised, or at the very least,  
4 could have been raised, in the prior 2011 case. The case involves the same parties and the claims  
5 were adjudicated against Myers on the merits. Myers's DTA-, Note-, and HAMP-based claims  
6 are barred by *res judicata*, and they are barred by his failure to restrain or enjoin the foreclosure  
7 sale. *See Frizzell v. Murray*, 179 Wn.2d 301 (2013). These claims are DISMISSED with  
8 prejudice.

9 Myers's CPA claim based on the same conduct is similarly barred, and he is also  
10 judicially estopped from asserting it based on his failure to list it as an asset for the benefit of his  
11 creditors. *See Hamilton v State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9<sup>th</sup> Cir. 2001).  
12 Myers's CPA claims based on pre-discharge acts or omissions are also DISMISSED with  
13 prejudice.

14 Myers's "bad faith," or breach of the duty of good faith and fair dealing, is not based on a  
15 contract between the parties (at least not one other than his loan documents, which are barred). It  
16 is not a free-floating claim; it must be tethered to some contract term between the parties. *See*  
17 *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569 (1991). Myers's claim that Flagstar "violated  
18 the CFPB Consent Order" (to which he was not a party) is not actionable as a matter of law.  
19 This claim too is DISMISSED with prejudice.

20 Myers has asked for leave to amend his compliant to address any deficiencies, and he has  
21 filed what the Defendants claim is a late and futile amended complaint in an effort to state a  
22 claim. The timeliness objection is over-ruled in light of the 12(b)((6) standard described above.  
23 Myers's amended complaint, however, does not address the deficiencies described in the  
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1 Defendants' motions or in this order. It relates almost exclusively to events in the 2007-2011  
2 time frame, and reiterates the note HAMP and Deed of Trust claims dismissed above. Myers  
3 concedes that he seeks a "re-do" of the entire mortgage and foreclosure history:

4 My ultimate claim, is that when the entire process is reviewed from first contact of the Plaintiff on 9/1/2009  
5 through to the Trustee's Sale in 2014, the Court will find that Flagstar's refusal to meet their legal HAMP  
6 obligations was to force the property into the highly profitable foreclosure credit bid. Had Flagstar  
7 followed FNMA or HAMP rules fairly and responsibly, the Plaintiff could still have his home. Plaintiff did  
8 not need to suffer a Chapter 7 Bankruptcy, and two legal actions and severe emotional pain, suffering  
9 and distress.

10 [Amended Complaint, Dkt. #22 at 25] The Amended complaint is deficient and fails to state a  
11 claim as a matter of law, and it is DISMISSED. Plaintiff Myers has not and cannot assert a  
12 claim against Defendant MCT, or Defendant FNMA (and has not sought to do so). MCT's  
13 Motion to Dismiss [Dkt. #15] is GRANTED, and all of Myers's claims against it are  
14 DISMISSED with prejudice and without leave to amend. FNMA's Motion to dismiss [Dkt. #14]  
15 is GRANTED, and all of Myers's claims against it are DISMISSED with prejudice and without  
16 leave to amend.

17 However, where a pleading deficiency plausibly can, within the context of the existing  
18 factual allegations, be cured, the corrective for a defective pleading is amendment, not dismissal.  
19 Myers has not yet asserted an actionable claim against Flagstar, but it cannot be said that he  
20 cannot possibly do so consistent with the facts alleged. Myers may file a second amended  
21 complaint within 21 days of this order, addressing the deficiencies in his claims against Flagstar  
22 noted in Flagstar's Motion and in this Order. To be clear, none of Flagstar's acts or omissions  
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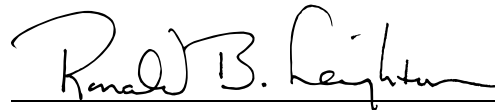
1 prior to the foreclosure sale are actionable, and any claim or complaint based on those allegations  
2 will be promptly dismissed on the court's own motion.

3 Defendant Flagstar's Motion to Dismiss is GRANTED and Plaintiff Myers's current  
4 claims against it are DISMISSED with prejudice. Myers may file a second amended complaint  
5 within 21 days of the date of this order addressing the deficiencies in his claim against defendant  
6 Flagstar (*only*), as outlined in this order. If he does not, or if the second amended complaint  
7 continues to fail to state a claim, the case will be dismissed with prejudice without further notice.

8 Myers's Motions for emergency, mandatory relief [Dkt. #s 18 and 24] are DENIED.

9 IT IS SO ORDERED.

10 Dated this 13<sup>th</sup> day of August, 2015.

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13 Ronald B. Leighton  
14 United States District Judge  
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